

Supreme Court, U. S.  
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Supreme Court of the United States

MICHAEL ROSAK, JR., CLERK

OCTOBER TERM 1976

No. ... **76-382**

THE CARBORUNDUM COMPANY,

*Petitioner,*

*v.*

THE UNITED STATES,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CUSTOMS AND  
PATENT APPEALS**

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# Supreme Court of the United States

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No. ....

THE CARBORUNDUM COMPANY,

*Petitioner,*

v.

THE UNITED STATES,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

The Carborundum Company petitions for a writ of certiorari to review a final judgment of the United States Court of Customs and Patent Appeals reversing the decision of the United States Customs Court which had sustained the contention of petitioner that certain imported powdered ferrosilicon is classifiable as "ferrosilicon" under item 607.50, Tariff Schedules of the United States (hereinafter TSUS). The Court of Customs and Patent Appeals affirmed the Customs classification of the merchandise as alloy iron or steel powders, other than stainless steel powders, under item 608.08 TSUS.

### Opinions Below

The opinion of the United States Court of Customs and Patent Appeals (C.A.D. 1172, June 17, 1976) is reported at 63 C.C.P.A. —, Customs Bulletin and Decisions of July 9, 1976, page 105, and — F.2d —. The opinion of

the United States Customs Court (C.D. 4584, February 10, 1975) is reported at 74 Cust. Ct. 50, and Customs Bulletin and Decisions of March 12, 1975, Page 35, and 393 F. Supp. 211. Both opinions are printed in the Appendix to this petition at pages 1a through 10a, and 11a through 20a, respectively.

### Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1256. The judgment of the Court of Customs and Patent Appeals is dated June 17, 1976 and was entered on that date.

### Questions Presented

Did the Court of Customs and Patent Appeals commit error in disregarding the fundamental rule of statutory construction that the legislative intent is all important; and in rejecting petitioner's claim for classification as "ferrosilicon" despite clear evidence of Congressional intent to classify powdered ferrosilicon as a class or kind of ferrosilicon.

### Statute Involved

The pertinent portions of the Tariff Schedules of the United States involved in this appeal with rates of duty in effect at the time of importation read as follows:

#### Schedule 6.—Metals and Metal Products

#### Part 2.—Metals, Their Alloys, and Their Basic Shapes and Forms

#### Subpart B.—Iron or Steel

#### Subpart B. headnotes:

#### 2. Grades of Iron, Steel and Ferroalloys.—For the

purposes of the tariff schedules, the following terms have the meanings hereby assigned to them.

(e) *Ferroalloys*: Alloys of iron (except spiegeleisen and ferronickel, as defined in headnotes 2(c) and 2(d), supra, respectively) which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals and which contain one or more of the following elements in the quantity, by weight, respectively indicated:

over 30 percent of manganese, or  
over 8 percent of silicon, or  
over 30 percent of chromium, or  
over 40 percent of tungsten, or  
a total of over 10 percent of other alloy elements, except copper, and

which, if containing silicon, do not contain over 96 percent of nonferrous alloy elements, or, if containing manganese but no silicon, do not contain over 92 percent of nonferrous alloy elements, or if containing no manganese and no silicon, do not contain over 90 percent of nonferrous alloy elements. For the purposes of this subpart—

(v) *ferrosilicon* is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent of silicon;

#### Ferroalloys:

#### Ferrosilicon:

607.50	Containing over 8 percent but not over 60 percent by weight of silicon .....	0.44 per lb. on silicon content
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Sponge iron; iron or steel powders:  
Sponge iron, including powders thereof:

## Other powders:

Other than alloy iron or  
steel .....

## Alloy iron or steel:

Stainless steel powders .....

608.08 Other ..... 15% ad val

**Statement of the Case**

This case raises the fundamental question of whether the courts of the United States may ignore the clear and unmistakable evidence of the intent of Congress as to the Customs classification of imported merchandise.

The petitioner imported powdered ferrosilicon at the Port of Buffalo, New York. The United States Customs Service classified the merchandise under item 608.08 TSUS as alloy iron or steel powders, other than stainless steel powders. Petitioner filed a civil action against such classification in the United States Customs Court, contending that the powdered ferrosilicon belonged to a class or kind of ferrosilicon, and that Congress clearly intended to classify powdered ferrosilicon as ferrosilicon. The Customs Court sustained petitioner's contention and rendered judgment in favor of the petitioner.

Respondent filed an appeal to the Court of Customs and Patent Appeals, contending that the imported powdered ferrosilicon was not "commonly used as raw material in the manufacture of ferrous metals" and therefore not classifiable as ferrosilicon. The Court of Customs and Patent Appeals sustained respondent's contention and reversed the judgment of the Customs Court. In its opinion the Court of Customs and Patent Appeals noted that the powder was "imported as a special ferrosilicon for use in the heavy-media separation process."

**Reasons for Granting the Writ**

The decision of the Court of Customs and Patent Appeals violates a fundamental rule of statutory construction, namely that the legislative intent is paramount. *Philbrook v. Glodgett*, 421 U.S. 707, 713, 44 L.Ed. 2d 525, 95 S. Ct. 1893 (1975); *Kokoszka v. Belford*, 417 U.S. 642, 650, 41 L.Ed. 2d 374, 94 S. Ct. 2431 (1974); *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453, 458, 38 L.Ed. 2d 646, 94 S. Ct. 690 (1974); *United States v. American Trucking Association, Inc.*, 310 U.S. 534, 542, 84 L.Ed. 1345, 605 S. Ct. 1059 (1940); *United States v. Stone & Downer Company*, 274 U.S. 225, 239, 71 L.Ed. 1013, 47 S. Ct. 616 (1927).

The legislative history of item 607.50 demonstrates that it was intended to include powdered ferrosilicon.

We invite attention to the *Summaries of Tariff Information*, 1948, Volume 3, Part 1, dealing with "Principally Pig Iron, Ferrous Scrap, and Ferro-Alloys," classifiable under paragraphs 301 and 302, Tariff Act of 1930. The summaries were prepared by the United States Tariff Commission.

On page 51 of volume 3 the following appears:

Ferrosilicon is an alloy of iron and silicon containing from about 7 percent up to 96 percent silicon; silicon metal contains 96 percent or more of silicon. Ferrosilicon, which accounts for nearly all of the output, is manufactured in the United States from domestic materials in both the blast furnace and electric furnace, and is used principally as a deoxidizer in the manufacture of steel, in the production of high silicon steel for electrical uses and to a small extent in mineral separation

by the heavy-media method.<sup>1</sup> Silicon metal is used in the processes of making aluminum and certain other nonferrous metals or alloys. [Emphasis added]

<sup>1</sup> In the heavy-media process (also known as the sink-float process) finely divided ferrosilicon is suspended in water to form the heavy medium. Waste material in most ores is lighter than the adjusted heavy medium, and floats; the more valuable heavy portions of the ore sink and are drawn off from the bottom of the heavy-media cone.

The 1948 summaries are akin to the 1929 summaries as to which it was said in *Textile Printing and Finishing Co. Inc. v. United States*, 49 CCPA 24, C.A.D. 789 (1962), at pages 27-28:

[A]s was held in *United States v. J. Eisenberg, Inc.*, 43 CCPA 105, C.A.D. 616, it is well settled that such information is recognized by this court as authoritative for the purpose of resolving questions relating to the meaning and scope of terms which appear in the various tariff acts, and determining the intent of Congress.

Thus, there is unmistakable recognition by the Tariff Commission of "finely divided ferrosilicon" used in the heavy-media or sink-float process of mineral separation, as belonging to a class or kind of merchandise known as ferrosilicon which is used as a raw material in the manufacture of steel; and that such finely divided ferrosilicon was classified as ferrosilicon under the Tariff Act of 1930. It is therefore significant that the "Tariff Classification Study" (1960) Schedule 6, page 92, states:

[I]tem 607.30 through 607.80 cover ferroalloys as defined in headnote 2(e). The provisions for the ferroalloys named in items 607.30 through 607.75 do not involve rate changes. According to information

received from the trade such provisions cover all of the important ferroalloys now in trade channels . . . .

The Tariff Classification Study has been recognized as an authoritative source for the ascertainment of legislative intent in connection with TSUS. See *Rifkin Textiles Corp. v. United States*, 54 CCPA 138 at page 141, C.A.D. 925 (1967).

From the Tariff Classification Study, it is plain that powdered ferrosilicon was classified as ferrosilicon prior to the enactment of TSUS, and that no change was intended by TSUS. It is also clear that Schedule 6, Part 2, Subpart B was intended to include, among other things, powdered ferrosilicon used in the heavy-media (sink-float) process of mineral separation of ferrous ores.

The "Tariff Classification Study," Schedule 6, page 91, also indicates that the final proposed provisions with respect to alloy steel are practically the same as those in the Brussels Nomenclature, which likewise has been held to be a reliable source for the determination of Congressional intent. See *Herbert G. Schwarz, etc. v. United States*, 57 CCPA 19, C.A.D. 971, 417 F.2d 1391 (1969).

In the Brussels Nomenclature, ferroalloys are defined in Note 1(c) to Chapter 73 as follows:

(c) Ferro-alloys (heading No. 73.02):

Alloys of iron (other than master alloys as defined in Note 1 to Chapter 74) which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals and which contain, by weight, separately or together:

more than 8% of silicon, or  
more than 30% of manganese, or  
more than 30% of chromium, or  
more than 40% of tungsten, or

a total of more than 10% of other alloy elements (aluminum, titanium, vanadium, copper, molybdenum, niobium or other elements, subject to a maximum content of 10% in the case of copper), and which contain, by weight, not less than 4% in the case of ferro-alloys containing silicon, not less than 8% in the case of ferro-alloys containing manganese but no silicon or not less than 10% in other cases, of the element iron.

Heading 73.02 of the Nomenclature reads: "Ferro-alloys".

The explanatory notes to Heading 73.02 include the following:

Ferro-alloys are not normally used for rolling, forging or other working, at least not for industrial purposes, even though some are malleable. They are used in the iron or steel industry mainly to add definite proportions of alloying elements to steel or cast iron in order to obtain special qualities, generally in those cases where the use of the pure elements themselves would be impracticable or uneconomic. Some are also used as de-oxidants, de-sulphurisers or denitrating agents.

Certain ferro-alloys can be used directly for casting. To fall within the heading, ferro-alloys must be in the form of ingots, pigs, blocks, pieces, granules or *powder* or in forms obtained by the continuous casting process (e.g., billets). [Emphasis added]

Clearly, the legislative history supports the decision of the Customs Court that ferrosilicon should not be excluded from classification as such, merely because it is in powdered form. The Court of Customs and Patent Appeals does not even mention the *Summaries of Tariff Information*, 1948, nor the Brussels Nomenclature or Explanatory Notes.

The Court of Customs and Patent Appeals does refer to the *Tariff Classification Study*, but comes to an erroneous conclusion concerning the statement that "there is something amiss" in the treatment of ferrosilicon. The "something amiss" was the contention made under the Tariff Act of 1930 that ferrosilicon should be *excluded* from paragraph 302(i) as ferrosilicon. This was intended to be cured by the ferrosilicon provisions of the Tariff Schedules of the United States.

### Conclusion

This Court should review and correct the erroneous decision of the Court of Customs and Patent Appeals which disregards the fundamental precept that the all-important rule of statutory construction is legislative intent.

Dated: Sept. , 1976.

Respectfully submitted,

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## APPENDIX

**Decision.****UNITED STATES COURT OF CUSTOMS  
AND PATENT APPEALS**

Customs Appeal No. 75-26

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THE UNITED STATES,

Appellant,

v.

THE CARBORUNDUM COMPANY,

Appellee.

C.A.D. 1172

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DECIDED: June 17, 1976

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LANE, Judge.

This is an appeal from the judgment of the United States Customs Court, 74 Cust. Ct. 50, C.D. 4584, 393 F.Supp. 211 (1975), holding that certain iron-silicon alloy powder is classifiable as "ferrosilicon" under item 607.50, TSUS, as contended by the importer, rather than as alloy iron or steel powders, other than stainless steel powders, under item 608.08, TSUS, as originally classified. We reverse.

*The Merchandise Imported*

The imported merchandise is an iron-silicon alloy powder which contains 75.94 percent iron, and 16.33 percent silicon. It has been specially processed in Canada by pulverizing lump ferrosilicon to a 65 mesh particle size. The powder is imported as a special ferrosilicon for use in the heavy-media separation process.<sup>1</sup>

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<sup>1</sup> In the heavy-media separation process (also known as the sink-float process) finely divided ferrosilicon is suspended in water

(footnote continued on following page)

## Statutes

The pertinent portions of the Tariff Schedules of the United States involved in this appeal with rates of duty in effect at the time of importation read as follows:

## Schedule 6.—Metals and Metal Products

## Part 2.—Metals, Their Alloys, and Their Basic Shapes and Forms

. . . . .

## Subpart B.—Iron or Steel

## Subpart B headnotes:

. . . . .

2. *Grades of Iron, Steel and Ferroalloys.*—For the purposes of the tariff schedules, the following terms have the meanings hereby assigned to them.

. . . . .

(e) *Ferroalloys:* Alloys of iron (except spiegel-eisen and ferronickel, as defined in headnotes 2(c) and 2(d), supra, respectively) which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals and which contain one or more of the following elements in the quantity, by weight, respectively indicated:

over 30 percent of manganese, or  
over 8 percent of silicon, or  
over 30 percent of chromium, or  
over 40 percent of tungsten, or

(footnote continued from preceding page)

to form a heavy medium slurry. Two raw materials that have different specific gravities are introduced into the slurry. Typical raw materials include a mixture of heavy ore and light waste rock. The heavier materials sink to the bottom of the slurry while light materials float on the surface of the slurry. In this way two materials can be separated from mixtures which contain them both.

a total of over 10 percent of other alloy elements, except copper, and

which, if containing silicon, do not contain over 96 percent of nonferrous alloy elements, or, if containing manganese but no silicon, do not contain over 92 percent of nonferrous alloy elements, or if containing no manganese and no silicon, do not contain over 90 percent of nonferrous alloy elements. For the purposes of this subpart—

. . . . .

(v) *ferrosilicon* is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent of silicon;

## Ferroalloys:

. . . . .

## Ferrosilicon:

607.50	Containing over 8 percent but not over 60 percent by weight of silicon .....	0.4¢ per lb. on silicon content
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. . . . .

Sponge iron; iron or steel powders:  
Sponge iron, including powders thereof:

. . . . .

## Other powders:

Other than alloy iron or steel .....

## Alloy iron or steel:

	Stainless steel powders .....	
608.08	Other .....	15% ad val

### Customs Court Opinion

The Customs Court relied on the headnote 2(e)(v) definition of ferrosilicon and the Government's concession that the imported goods possessed the requisite weight requirements of that definition, in finding that the imported merchandise was dutiable as ferrosilicon under item 607.50, TSUS. The court did not view the provision for ferrosilicon as limited by the definition of the term ferroalloys, viz., "alloys of iron \* \* \* commonly used as raw material in the manufacture of ferrous metals," given in headnote 2(e), even though the provision for ferrosilicon was indented under the term ferroalloy in the TSUS. However, the court also found that even if the definition of ferroalloy was determinative of classification then the evidence of record showed that the imported merchandise was, *eo nomine*, ferrosilicon, which was a class or kind of iron alloy commonly used as raw material in the manufacture of ferrous metals.

### OPINION

As noted above, the dispute in this case centers about the applicability of the provision claimed by the importer, namely, item 607.50, TSUS, to the imported merchandise. The Government argues that in order for the imported merchandise to fall within the purview of item 607.50, TSUS the merchandise must not only meet the criteria for ferrosilicon, as defined in headnote 2(e)(v), but it also must meet the criteria for ferroalloys, as defined in headnote 2(e). The Government contends that the imported merchandise is not a ferroalloy because it is not an alloy of iron which is "commonly used as raw material in the manufacture of ferrous metals."

We believe that Congress, by indenting provisions for ferrosilicon, such as item 607.50 in question, under the term "Ferroalloys:" in Schedule 6, Part 2, Subpart B, intended that the term ferrosilicon, as used in the TSUS,

be limited to those iron-silicon alloys which not only meet the statutory requirements for ferrosilicon set forth in headnote 2(e)(v), but also meet the statutory requirements for ferroalloys set out in headnote 2(e). That is, the term ferrosilicon should be construed as a further limitation on the term ferroalloys, incorporating therein all the requirements for the definition of ferroalloys. In harmony with this view is General Interpretative Rule 10(c)(i) which reads:

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

(i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

which is to say that the imported merchandise must meet all the requirements for the superior heading, here "ferroalloy," in order to be classified under the inferior heading, here "ferrosilicon."

We find further support for this view in the *Tariff Classification Study* (1960), Schedule 6, Part 2, at 91, in its comment on ferronickel. In particular we note the following language:

Moreover, it is not entirely clear that it [ferronickel] would always conform to the proposed definition of ferroalloy in that some of it may be usefully malleable.

In part because of this concern that ferronickel would not always fit the proposed definition for ferroalloy, a separate provision was established for ferronickel; that is, it was not indented under the term ferroalloy. We believe that implicit in this action is a recognition that all alloys which remain enumerated under ferroalloys in the TSUS must

fit the three-part definition of ferroalloys given in headnote 2(e).

Since we have found that the imported merchandise must be "commonly used as raw material in the manufacture of ferrous metals" in order for classification under item 607.50 to be proper, we now turn to a consideration of the question of whether the imported merchandise fit this criterion.

As part of its dual burden of proving that the assigned classification is incorrect and proving the proposed classification correct,<sup>2</sup> the importer has the burden of proving that the imported merchandise is commonly used as raw material in the manufacture of ferrous metals.

General Interpretative Rule 10(e)(i) defines how use requirements (other than actual use) are to be construed:

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

Therefore, on the record before us, the importer must establish that the imported merchandise belongs to a class or kind of merchandise which is commonly used as raw material in the manufacture of ferrous metals.

The evidence before us shows convincingly that lump ferrosilicon (particle size  $\frac{1}{4}$ " to 2"), or powder ferrosilicon having particles of mesh size 20 or larger, is com-

<sup>2</sup> *Maier-App & Co. v. United States*, 57 CCPA 31, C.A.D. 973, 418 F.2d 922 (1969); *United States v. New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F.2d 1315 (1970).

monly used as raw material in the manufacture of ferrous metals. We must therefore consider whether the imported powdered ferrosilicon of mesh size 65 belongs to this same class or kind of ferrosilicon.

To determine whether the imported iron-silicon alloy is of the same class or kind as that commonly used as raw material in the manufacture of ferrous metals, we must look to all the pertinent circumstances. *Star-Kist Foods, Inc. v. United States*, 45 CCPA 16, C.A.D. 666, 275 F.2d 472 (1957). Factors which have been considered by courts to be pertinent in determining whether imported merchandise falls within a particular class or kind include the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, *Maier-App & Co.*, supra at 37, 418 F.2d at 926 (Baldwin, J., concurring), the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed, *United States v. Baltimore & Ohio R.R.*, 47 CCPA 1, C.A.D. 719 (1959)), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use. *Bob Stone Cordage Co. v. United States*, 51 CCPA 60, C.A.D. 838 (1964). Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling. *Baltimore & Ohio R.R.*, supra; *Maier-App & Co.*, supra at 37, 418 F.2d at 926 (Baldwin, J., concurring).

Many of the pertinent factors relied upon in prior cases are present here, and all show that the import is not of a class or kind commonly used as a raw material in the manufacture of ferrous metals. The record shows that the imported ferrosilicon is only used for heavy-media separation, which has been characterized as a mining operation, not manufacturing. Therefore the ultimate purchasers of the import would not be the same as the purchasers of the class of material used in the manufacture of ferrous metals.

Each would have different expectations for the product and different purposes for making the purchase, and would be in different channels of trade. Furthermore, it is not commercially practical to use the import in the manufacture of ferrous metals. The record indicates that such phenomena as the turbulence in blast furnaces and the density needed to penetrate the slag or go into the metal render 65 mesh powder too fine to be used in the manufacture of ferrous metals.

Moreover, the imported goods have been specially processed to provide the import with a utility *different* from the class. The importer's witness testified that lump iron-silicon alloy of the general size used in manufacturing ferrous metals is further processed, at some expense, in an aero-fall mill and a cyclone separator to achieve a high density alloy which is fine enough for heavy-media separation use. Then the powder is fed through a magnetic separator, which removes low iron content (high silicon content) particles. This processing destroys the alloy's usefulness for ferrous metals manufacture while creating the properties necessary for heavy-media separation.

Finally, we note that the record indicates that between about 20 mesh and 65 mesh there is a natural dividing line separating two classes of iron-silicon alloys. According to the un rebutted testimony of a government witness, iron-silicon alloy powders with particles smaller than 20 mesh are so fine that, as a class, they are not used as raw materials in the manufacture of ferrous metals. On the other hand, iron-silicon alloys in which particle size is between 20 mesh and 2 inches have a chief use as a raw material in the manufacture of ferrous metals. Thus the record reflects two distinct, nonoverlapping uses—below 65 mesh the only shown use is in heavy-media separation, above 20 mesh the only shown use is as a raw material in the manufacture of ferrous metals.

For the above reasons, we conclude that the importer has not met its burden of proving that the imported powder

is a member of the class of iron-silicon alloy which is commonly used in the manufacture of ferrous metals.

Alternatively, the importer asserts that the heavy-media separation process is a preprocessing step in the manufacture of ferrous metals and, therefore, that the imported goods are per se used in the manufacture of ferrous metals. We cannot agree that the use of iron-silicon alloy powder in the heavy-media separation process is a use as a raw material in the manufacture of ferrous metals. First, the alloy powder is used over and over; it is not intended to be a raw material which forms a component of the ferrous metal. Second, the process is not a manufacturing step as far as the ultimate production of a ferrous metal is concerned. The process merely segregates pieces of one density from those of other densities. It in no way transforms or operates on the iron ore by modifying its composition or physical form to advance its ultimate manufacture into ferrous metal. Third, the heavy-media separation process is not limited to iron ore separation. Thus, the ultimate goal is not necessarily a production of a ferrous metal.

The importer further contends that Congress did not intend that the TSUS change the classification for ferrosilicon as it existed under the Tariff Act of 1930, in which fine powdered ferrosilicon was treated the same as lump ferrosilicon, both being classified under paragraph 302(i). In support of this argument the importer refers to the *Tariff Classification Study*, supra at 92, which states that with respect to the provisions for the ferroalloys named in items 607.30 to 607.75 no rate change was made. We cannot view this statement in the study as a positive indication that no change was made in the treatment of ferrosilicon in the TSUS from the Tariff Act of 1930. In the first place the same study, page 87, points out that "there is something amiss" in the treatment of ferrosilicon under paragraph 302(i). This dissatisfaction indicates a Congressional intent to modify the provisions for

ferrosilicon which existed in the 1930 Act. Moreover, the 1930 Act did not relate provisions for ferrosilicon to the term ferroalloy as does the TSUS. We therefore fail to find support for the importer's view that the ferrosilicon provisions of the TSUS were intended to be the full equivalent of the ferrosilicon provisions of paragraph 302(i) of the Tariff Act of 1930.

For the above reasons, the importer has not sustained its burden of proving that its proffered classification is correct. The judgment of the Customs Court is, accordingly, *reversed*.

REVERSED

C.D. 4584

UNITED STATES CUSTOMS COURT

THE CARBORUNDUM COMPANY V. UNITED STATES

Court No. 72-6-01324

Port of Buffalo

[Judgment for plaintiff.]

Decided Feb. 10, 1975

LANDIS, Judge: This action concerns the customs classification, at Buffalo, N.Y., of a product imported from Canada on August 6, 1969, described on the commercial invoice as abrasive furnace ferrosilicon.

Customs officials classified the product as an alloy of iron or steel powder, other than stainless steel powder, dutiable at 15 per centum ad valorem under item 608.08 of the Tariff Schedules of the United States (TSUS).

Plaintiff complains that the customs classification is incorrect and that the product instead is properly classifiable as ferrosilicon containing over 8 percent but not over 60 percent by weight of silicon (not over 30 percent manganese), dutiable under TSUS item 607.50 at 0.4 cent per pound on the silicon content.

The appropriate schedule 6, part 2, subpart B headnote, and pertinent items thereunder are as follows:

SCHEDULE 6.—METALS AND METAL PRODUCTS

Part 2.—Metals, Their Alloys, and Their Basic Shapes and Forms

Subpart B.—Iron or Steel

*Subpart B headnotes:*

1. This subpart covers iron and steel, their alloys,

and their so-called basic shapes and forms, and in addition covers iron or steel waste and scrap.

2. *Grades of Iron, Steel, and Ferroalloys.*—For the purposes of the tariff schedules, the following terms have the meanings hereby assigned to them:

• • • • •

(e) *Ferroalloys:* Alloys of iron (except spiegeleisen and ferronickel, as defined in headnotes 2(c) and 2(d), supra, respectively) which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals and which contain one or more of the following elements in the quantity, by weight, respectively indicated:

over 30 percent of manganese, or  
over 8 percent of silicon, or  
over 30 percent of chromium, or  
over 40 percent of tungsten, or  
a total of over 10 percent of other alloy elements,  
except copper, and

which, if containing silicon, do not contain over 96 percent of nonferrous alloy elements, or, if containing manganese but no silicon, do not contain over 92 percent of nonferrous alloy elements, or, if containing no manganese and no silicon, do not contain over 90 percent of nonferrous alloy elements. For the purposes of this subpart—

- (i) *ferrochromium* is a ferroalloy which contains, by weight, over 30 percent of chromium but not over 10 percent of silicon;
- (ii) *ferromanganese* is a ferroalloy which contains, by weight, over 30 percent of manganese but not over 10 percent of silicon;
- (iii) *ferromolybdenum* is a ferroalloy which contains, by weight, over 50 percent of molybdenum;

(iv) *ferrophosphorus* is a ferroalloy which contains, by weight, over 15 percent of phosphorus;

(v) *ferrosilicon* is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent of silicon;

• • • • •<sup>1</sup>

#### Ferroalloys:

• • • • •

#### Ferrosilicon:

- 607.50 Containing over 8 percent but not over 60 percent by weight of 0.4¢ per lb. on silicon ..... silicon content
- 607.51 Containing over 60 percent but not over 80 percent by weight of silicon ..... • • •
- 607.52 Containing over 80 percent but not over 90 percent by weight of silicon ..... • • •
- 607.53 Containing over 90 percent by weight of silicon ..... • • •

• • • • •

#### Sponge iron; iron or steel powders:

Sponge iron, including powders thereof:

• • • • •

#### Other powders:

- 608.05 Other than alloy iron or steel .... • • •

#### Alloy iron or steel:

- 608.06 Stainless steel powders ..... • • •
- 608.08 Other ..... 15% ad val.

The issue in this case clearly appears from the Govern-

<sup>1</sup> There follow similar statements with respect to ferrosilicon chromium, ferrosilicon manganese, ferrosilicon titanium, ferrosilicon tungsten, ferrotitanium, ferrotungsten, ferrovanadium, and ferrozirconium.

ment attorney's opening statement, in substance as follows:

The invoice shows the merchandise to be ferrosilicon and the witnesses for the plaintiff and the defendant refer to the merchandise as ferrosilicon but it is the Government's contention that nevertheless the merchandise is not ferrosilicon (under the main superior heading for ferroalloys) as defined in headnote 2(e) to schedule 6, part 2B of the tariff schedules. Ferroalloys are there defined as "alloys of iron which \* \* \* are commonly used as raw material in the manufacture of ferrous metals," but the Government will show the merchandise is of a particular class and grade of iron alloy not commonly used as a raw material in the manufacture of ferrous metals.<sup>2</sup> The facts relevant to the argument of that issue are not in dispute and can be stated briefly.

The imported ferrosilicon (exhibit 1)<sup>3</sup> contains 16.33 percent silicon and not over 30 percent of manganese, by weight. It is provenly ferrosilicon albeit a special type pulverized to the condition of powder<sup>4</sup> for use in the sink-float or heavy-media process that separates two materials of different specific gravities. That process is used at iron mines to separate iron ore from gangue, by scrap processors, and by the trade in rock or stone aggregate for road construction.

Plaintiff's witness, Mr. Jackson, was of the opinion that since the heavy-media process of separating iron ore from gangue is a step necessary to prepare the iron for melting

<sup>2</sup> The relative specificity of items 607.50 and 608.08 is not in dispute. Defendant's pleading admits plaintiff's allegation that item 607.50 is more specific than item 608.08.

<sup>3</sup> Various other exhibits in evidence will be referred to only to the extent deemed relevant.

<sup>4</sup> Much of the trial testimony is devoted to the question of whether the imported product is in the form of powder. Since plaintiff does not argue that it is not powder, I assume that the form or condition of the product as powder is not in dispute.

in the furnace, the use of powder ferrosilicon in the process was as a raw material in the manufacture of ferrous metals. He admitted that powder ferrosilicon was not added to the blast furnace as a raw material.

Defendant's witness Fairchild (employed by the Foote Mineral Company) stated that his company's competing pulverized silvery pig iron represented by exhibit A (R. 135), while the chemical analysis is not identical, is a heavy-media ferrosilicon competitive with the imported product represented by exhibit 1 (R. 133). Mr. Fairchild testified that exhibit A is a ferroalloy (R. 147-162), because the chemical analysis of the material is approximately fifteen and one-half percent silicon, possibly one percent manganese, about eight-tenths of carbon and less than one percent of other trace elements. Mr. Fairchild was of the opinion that powder ferrosilicon was not suitable for use as a raw material in the manufacture of ferrous metals but replied, when next asked on defendant's direct examination, as follows:

Q. Then, in terms of the definition of ferroalloy which you agreed to before [raw material used in the manufacture of ferrous metals] is Defendant's Exhibit A, in its present condition, in powder form, such a ferroalloy?

. . . . .

The Witness: Well, it would appear that the two definitions are mutually incompatible. The definition of ferroalloy doesn't identify the physical nature of the ferroalloy. It indicates, possibly, somewhat the chemical nature, iron plus and alloying element, but it doesn't indicate whether the material is in lump or powder form. I think the definition of ferroalloy is very general and it is not specific as to the physical form of the material. [R. 164-165.]

Defendant's witnesses were of the opinion that the heavy-media separation was not a step in the manufacture of

ferrous metals which, in their opinion, starts with the reduction of ores in the blast furnace.

Defendant's witness, Mr. Joynt, chief metallurgist at Republic Steel, Buffalo, N. Y., testified that powder ferrosilicon is too fine to be used in the manufacture of ferrous metals but he stated that his company had used powder ferrosilicon, made into briquets, as a raw material in the manufacture of ferrous metals. (R. 116.) All witnesses, so asked, agreed that ferrosilicon, without regard to form or condition, is a class or kind of product chiefly used as raw material in the manufacture of ferrous metals.

The dispute in this case, quite obviously, is bottomed on the form and condition of the imported ferrosilicon and its use in that form and condition, namely, powder. Plaintiff argues that the form and condition does not control the classification of ferrosilicon because it is a classification of a class or kind of ferroalloy and, irrespective of its form or condition and use in that form or condition, ferrosilicon is a class or kind of ferroalloy commonly used as a raw material in the manufacture of ferrous metals. In an additional point, plaintiff contends that the heavy-media process of separating iron ore from gangue is a process in the manufacture of ferrous metals, and that powder ferrosilicon commonly used in the separation process of iron ore from gangue, is a raw material in the manufacture of ferrous metals within the meaning and intent of the statutory headnotes relevant to the classification of ferroalloys and ferrosilicon. Defendant agrees that the term "ferroalloys" is intended to classify a class or kind of product that includes ferrosilicon. Defendant takes the position, however, that powder ferrosilicon used in the heavy-media process of separating iron ore from gangue is not ferrosilicon of the class or kind that is a ferroalloy for the reason that its use in the heavy-media process is not as a raw material in the manufacture of ferrous metals.<sup>5</sup> Plain-

<sup>5</sup> Defendant's answer admits that the imported ferrosilicon meets the requirement that it not be usefully malleable.

tiff, in reply, alludes to the proof that the imported powder ferrosilicon contains over 8 percent but not over 60 percent, by weight, of ferrosilicon. That proof says plaintiff *ipso facto* establishes that it is a ferroalloy, presumed under the relevant statutory headnote which states that for the purposes of subpart B, in which ferrosilicon is classified, "ferrosilicon is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent of silicon."

I hold the imported abrasive furnace ferrosilicon properly dutiable as ferrosilicon under TSUS item 607.50 for two reasons, to wit:

Firstly, the statutory headnote definitively states that ferrosilicon is a ferroalloy which contains by weight, not over 30 percent of manganese and over 8 percent of silicon. Defendant's pleading admits that the imported ferrosilicon meets those weight specifications.

Secondly, even assuming as defendant contends, the definition of the term "ferroalloys," viz: "alloys of iron . . . commonly used as raw material in the manufacture of ferrous metals" is determinative of the issue in this case, then under the evidence the imported ferrosilicon is ferrosilicon which is a class or kind of iron alloy that is commonly used as a raw material in the manufacture of ferrous metals. The weight of the evidence establishes that without regard to its form or condition, the imported ferrosilicon is, *eo nomine*, ferrosilicon which as a class or kind is chiefly and, therefore, commonly used as a raw material in the manufacture of ferrous metals.

As to my first reason, *supra*, for sustaining plaintiff's claimed classification under TSUS item 607.50, I note that defendant, contending that ferrosilicon in powder form is not a ferroalloy, relies entirely on the headnote definition that states that ferroalloys are alloys of iron, *inter alia*, commonly used as raw material in the manufacture of ferrous metals. To accept defendant's argument that the imported ferrosilicon is not commonly used as a raw material in the manufacture of ferrous metals and, therefore, not a

ferro-alloy, one must conclude that the superior heading "ferro-alloys" is narrower than the inferior heading "ferrosilicon." That conclusion is, however, patently at variance with TSUS General Interpretive Rule 10(c)(i) which states that "a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby." The conclusion is also clearly inapposite to what Congress was told in connection with the TSUS classification of "ferroalloys" and "ferrosilicon" namely, that "[s]urely, there is something amiss if the existing provisions [1930 Tariff Act] require that the generic word 'alloy' have a meaning more limited than a specific designation for a common ferroalloy known as 'ferrosilicon'." (Tariff Classification Study, Schedule 6, Part 2, page 87.)

Defendant's argument further assumes that the meaning assigned to the term "ferroalloys" in TSUS is all there is to the context of the headnote. But the context of the headnote does more than just assign a meaning to the term "ferroalloys." It is a well known judicial principle that statutes must be read and understood in their entire context. What defendant has significantly ignored or avoided discussing is the complete text of the headnote where Congress, after assigning a meaning to the term "ferroalloys," goes on to further state that for the purposes of the subpart (referring to the term "ferroalloys" and classifying the common ferroalloys) "ferrosilicon is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent of silicon." That, in my opinion, is a positive, straightforward and unambiguous statement that, within those weight specifications, ferrosilicon is a ferroalloy. Cf. *C. J. Tower & Sons of Buffalo, Inc. v. United States*, 56 Cust. Ct. 152, 162, C.D. 2623 (1966). If the TSUS statement was less positive or was not set forth in the headnote on ferroalloys, the classification of ferrosilicon would be uncertain and in every case subject to proof that ferrosilicon was commonly used as a raw material in the manufacture of ferrous metals. The proposition that Congress did not intend to leave it open to be decided whether

ferrosilicon in each case was used as a raw material in the manufacture of ferrous metals, but set its own determinant by providing simply that ferrosilicon is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent of silicon is, moreover, not new in the judicial classification of alloys. *United States v. Gulf Oil Corporation, et al.*, 47 CCPA 32, 41, C.A.D. 725 (1959) (alloy steel); *C. J. Tower & Sons v. United States*, 41 CCPA 195, C.A.D. 550 (1954) (alloy aluminum silicon); *American Import Co. v. United States*, 26 CCPA 116, C.A.D. 3 (1938) (alloy of copper); *United States v. Baltimore & Ohio R. R. Co.*, 16 Ct. Cust. Appls. 180, 185, T.D. 42810 (1928) (non-manganese alloy).

Getting on to my second reason, *supra*, for sustaining plaintiff's claimed classification under TSUS item 607.50, apropos defendant's basic argument, it is in my opinion completely illogical to admit that ferrosilicon is a class or kind of ferroalloy, as defendant does, and then go on to argue that the imported ferrosilicon is not that class or kind of ferrosilicon which is a ferroally.\* If Congress intended ferrosilicon in powder form' to be classified differently from the *eo nomine* class of ferrosilicon, it seems strange that it did not do so in the clear fashion by which it ex-

\* The phrase "commonly used" is classic tariff language intended to classify a class or kind of product. Cf. *Meyers & Co. v. United States*, 10 Ct. Cust. Appls. 216, 218, T.D. 38557 (1920); *Holdwire, Ltd. v. United States*, 49 Cust. Ct. 19, C.D. 2355 (1962); *United States v. Astra Bentwood Furniture Co.*, 25 CCPA 340, 345, T.D. 49434 (1938).

Compare, TSUS definition of "ferroalloys" with the not substantially different Brussels Nomenclature heading 73.02 definition of ferroalloys that includes "ferroalloys . . . in the form of ingots, blocks, lumps, pieces, granules or powder." [Emphasis added.] The Brussels Nomenclature " . . . [which] exerted the greatest influence on the arrangement of the proposed revised schedules" (Tariff Classification Study, Submitting Report, page 8) is persuasive that the TSUS term "ferroalloys" includes powder. Cf. *Schwarz v. United States*, 57 COPA 19, 22, C.A.D. 971 (1969).

cepted "spiegeleisen and ferronickel" from the meaning assigned the term "ferroalloys."<sup>s</sup>

This action claiming classification of the imported ferro-silicon under TSUS item 607.50 is, accordingly, sustained. Judgment will so enter.

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<sup>s</sup> For explanation excepting ferronickel from the definition of "ferroalloys" see, Tariff Classification Study, Schedule 6, Part 2, page 91.

NOV 4 1976

MICHAEL RODAN, JR., CLERK

No. 76-382

**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**THE CARBORUNDUM COMPANY, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF CUSTOMS  
AND PATENT APPEALS**

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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**ROBERT H. BORK,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.**

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This case involves a dispute concerning the proper classification under the Tariff Schedules of the United States (TSUS) of certain powdered ferrosilicon imported by petitioner. The United States Customs Service classified the ferrosilicon powder under TSUS Item 608.08 as an alloy iron or steel powder, other than a stainless steel powder. Petitioner contends that it should have been classified under TSUS Item 607.50 as a ferroalloy/ferrosilicon, upon which

the import duties are lower.<sup>1</sup> The Customs Court agreed with petitioner (Pet. App. 11a-20a), but the Court of Customs and Patent Appeals reversed, holding that the Custom Service's original classification had been correct (*id.*, at 1a-10a).

The ferrosilicon imported by petitioner is a "65 mesh powder,"<sup>2</sup> composed principally of iron (75.94 percent) and silicon (16.33 percent). Lump or powder ferrosilicon, having particles of mesh size 20 or larger, is commonly used as a raw material in the manufacture of ferrous metals (Pet. App. 1a, 6a-7a). But 65 mesh ferrosilicon powder, such as that imported by petitioner, is too fine to be used for such purposes. It is imported for use in the "heavy-media separation process" (*id.*, at 1a, 7a-8a). That process involves the suspension of fine ferrosilicon particles in water to form a heavy medium slurry. Raw materials with different specific gravities are added to the slurry. The materials heavier than the water-ferrosilicon mixture sink to the bottom of the slurry while the lighter materials float on the surface. In this way the heavier raw materials are separated from the lighter (*id.*, at 1a-2a, n. 1).

On the basis of these facts, which are not disputed by petitioner, the Court of Customs and Patent Appeals correctly sustained the Customs Service's classification of the ferrosilicon powder imported by

<sup>1</sup> The pertinent portions of the Tariff Schedules are set forth at Pet. 2-4.

<sup>2</sup> A "65 mesh powder" is a powder capable of passing through a screen having 65 wires per inch.

petitioner under TSUS Item 608.08 as an alloy iron or steel powder. TSUS Item 607.50, "ferrosilicon", which petitioner contends applies to the materials in question, appears as a subheading under the more general heading "[f]erroalloys", which defines ferroalloys by means of a use test. Ferroalloys are defined as alloys of iron "which are not usefully malleable and are commonly used as raw material in the manufacture of ferrous metals \* \* \*" and which contain more than stated percentages of certain metals. The subheading defining ferrosilicon states that ferrosilicon "is a ferroalloy which contains, by weight, not over 30 percent of manganese and over 8 percent silicon" (Pet. App. 2a-3a).

As the Court of Customs and Patent Appeals pointed out (Pet. App. 4a-5a), TSUS General Interpretative Rule 10(c)(i) requires that a subheading like "ferrosilicon" be read to be narrower in scope than a superior heading like "[f]erroalloy".<sup>3</sup> Thus, to be classified as ferrosilicon under TSUS Item 607.50, the material must be "commonly used as raw material in the manufacture of ferrous

<sup>3</sup> TSUS General Interpretative Rule 10(c)(i) provides (Pet. App. 5a):

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; but, in applying this rule of interpretation, the following considerations shall govern:

(i) a superior heading cannot be enlarged by inferior headings indented under it but can be limited thereby;

metals \* \* \*." As already noted, ferrosilicon powder, such as that imported by petitioner, cannot be used in the manufacture of ferrous metals.

Petitioner's contention that the ferrosilicon powder imported by it nevertheless should be classified under TSUS Item 607.50 rests upon three publications that petitioner claims have been recognized as containing authoritative evidence of congressional intent in connection with the TSUS. But two of those publications—*Summaries of Tariff Information* and *Brussels Nomenclature*—simply acknowledge that ferrosilicon can exist in powdered form and that, in such form, it can be used for heavy-media separation purposes (see Pet. 5-8). The third publication—*Tariff Classification Study*—states that the current provisions of the TSUS dealing with ferroalloys do not involve rate changes from the Tariff Act of 1930, which treated all ferrosilicon alike, whether in lump or powder form (see Pet. App. 9a). But this does not mean that no changes were made in the definitions of ferroalloys or ferrosilicon. The same publication states that "there is something amiss" in the treatment of ferrosilicon under the Tariff Act of 1930 (see *ibid.*). As the Court of Customs and Patent Appeals noted (*id.*, at 9a-10a):

This dissatisfaction indicates a Congressional intent to modify the provisions for ferrosilicon which existed in the 1930 Act. Moreover, the 1930 Act did not relate provisions for ferrosilicon to the term ferroalloy as does the TSUS. We therefore fail to find support for [petitioner's]

view that the ferrosilicon provisions of the TSUS were intended to be the full equivalent of the ferrosilicon provisions \* \* \* of the Tariff Act of 1930.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

NOVEMBER 1976.